

that marriage for nearly ten years. Although I have been unable to make the declarations asked for because of lack of jurisdiction there is little doubt what I would be inclined to do, in the absence of any explanation of her inaction as aforesaid since 1962, if the courts had jurisdiction to make bare declarations under Order 15 rule 16 as to the validity of such marriages.

In all the circumstances the proper order in respect of costs should, I think, be that the parties should bear their own costs.

*Order accordingly.*

Solicitors: *Chor Pee & Hin Hiong; Murphy & Dunbar.*

## MALAYSIAN REPORTS

### PUBLIC PROSECUTOR v. JOSEPH CHIN SAIKO

[A. Cr. J. (Lee Hun Hoe J.) October 5, 1971]

[Kota Kinabalu — Criminal Appeal No. 6 of 1971]

*Penal Code, s. 304A — Causing death by a rash or negligent act — Standard in measuring rashness or negligence — Same as for charge under s. 14(1) of Road Traffic Ordinance (Cap. 128) — Lack of degree of care and attention that a reasonable and prudent driver would exercise in the circumstances.*

This was an appeal against the acquittal of the accused on a charge under section 304A of the Penal Code. The accused had been charged on two charges, one under section 304A of the Penal Code and the other under section 14(1) of the Road Traffic Ordinance. The learned stipendiary magistrate found the accused guilty on the second charge but acquitted him on the charge under section 304A of the Penal Code as he held that the prosecution had not proved the substantially high degree of negligence required to warrant a conviction under that section.

Held, allowing the appeal: the magistrate had misdirected himself on the degree of negligence required to substantiate a charge under section 304A of the Penal Code. The degree of negligence is the same as that required on a charge under section 14(1) of the Road Traffic Ordinance, that is, the lack of degree of care and attention that a reasonable and prudent driver would exercise in the circumstances.

#### Cases referred to:-

- (1) *Public Prosecutor v. P. G. Mills* [1971] 1 M.L.J. 4.
- (2) *Cheow Keok v. Public Prosecutor* [1940] M.L.J. 103.
- (3) *Lai Tin v. Public Prosecutor* [1939] M.L.J. 248; [1938] F.M.S.L.R. 290.
- (4) *Woo Sing & Anor v. R.* [1954] M.L.J. 200.
- (5) *Mah Kah Yew v. Public Prosecutor* [1971] 1 M.L.J. 1.
- (6) *Re Lee Gee Chong, decd.* [1965] 1 M.L.J. 102.
- (7) *China Insurance Co. Ltd. v. Loong Moh Co. Ltd.* [1964] M.L.J. 307, F.C.
- (8) *K. E. Mohamed Sultan Maricar v. Prudential Assurance Co. Ltd.* [1941] M.L.J. 20.
- (9) *Hendry v. De Cruz* [1949] M.L.J. Supp. 25.
- (10) *Builer Madden v. Krishnasamy* [1947] M.U.L.R. 163.
- (11) *Anthonyssamy v. Public Prosecutor* [1956] M.L.J. 247.
- (12) *Dabholkar v. The King* [1948] A.C. 221.
- (13) *Tan Kim Chang v. R.* [1953] M.L.J. 186.
- (14) *John Liao v. Public Prosecutor* (Jesselton Criminal Appeal No. 22 of 1966; unreported).
- (15) *R. v. Lucas bin Daim* (High Court, Papar, Crim. App. C. No. 0/57 of 1959; unreported).
- (16) *Ellen Joyce Kay v. R.* (High Court, Jesselton, Crim. App. C. No. A/3 of 1963; unreported).
- (17) *Kuan Choon Hin v. Public Prosecutor* [1940] M.L.J. 114.
- (18) *Voo Yun Fatt v. R.* [1957] S.C.R. 127.
- (19) *Simpson v. Peat* [1952] 1 All E.R. 449.
- (20) *Bourhill v. Young* [1943] A.C. 92.

### MAGISTRATE'S CRIMINAL APPEAL.

*Joseph Kitingan* (Deputy Public Prosecutor) for the appellant.

*Shelley Yap* for the respondent.

**Lee Hun Hoe J.:** This is an appeal by the learned Public Prosecutor against an acquittal order made by the learned stipendiary magistrate in respect of the first count concerning an offence under section 304A of the Penal Code. The second count was concerned with an offence under section 14(1) of the Road Traffic Ordinance (Cap. 128). On this count the respondent was convicted and sentenced to a fine of \$350

or 4 months' imprisonment in default. He was also disqualified from driving for a period of six months.

Briefly the facts are that on December 23, 1970 at about 6.30 p.m., the deceased, riding a scooter No. J 8439 with Wong Pah Chung (P.W.3) as a passenger, was returning to the Queen Elizabeth Hospital from a youth club and was travelling on his left towards the direction of Penampang, Kota Kinabalu, when the scooter was hit by a taxi No. EJ 9011 driven by the respondent coming from the opposite direction. The accident occurred after he passed the Secretariat where there is a slight bend. The taxi, coming from the opposite direction, suddenly swerved to its right and hit the scooter throwing the deceased and P.W.3 to the ground. The taxi then swerved to its left. Both the deceased and P.W.3 were taken to the hospital, a short distance away. Subsequently the deceased died as a result of serious multiple injuries received in the accident.

The first ground of appeal is that the learned stipendiary magistrate misdirected himself in law in saying that a substantially high degree of negligence was required to warrant a conviction under section 304A of the Penal Code. He clearly found that the respondent was negligent when he stated at page 25 of the record as follows:—

"In this case, this court is prepared to accept the evidence of P.W.4 that the taxi swerved to its right and after the collision swerved back to its left. The sketch plan and the evidence of P.W.9 as well as the evidence of P.W.5 (the vehicle examiner) as to damages sustained by the taxi, sufficiently support this version of the accident. In view of this, this court entertains no doubt that there was some degree of negligence on the part of the accused, which led to the accident occurring on the wrong side of the road."

However, he was confused about the degree of negligence required and, as will be seen, his finding could not be supported. He continued:—

"The question is what degree? There is the testimony of P.W.4 that in swerving to its right the taxi left a space of only two feet for the scooter to pass. If this part of the evidence were accepted, there would have been sufficient negligence to justify a conviction under section 304A. However this court feels it unsafe to accept it that the space of clearance allowed the scooter was in fact about two feet."

He then made the finding, I think wrongly, that —

"There was no evidence as to where exactly this witness was standing so as to enable one to say that he was assessing the occurrence from a point of vantage."

A perusal of the record of the cross-examination by the respondent would have shown the learned stipendiary magistrate where P.W.4 was standing and how the accident occurred. In reply to the respondent's questions P.W.4 gave the following answers:—

"I was standing near the office not at the bus stop. The place where I stood and the bus stop there was a distance of about a hundred feet in between. The bus stop was nearer to the Secretariat than the hospital. I was standing alone. I was not walking towards the bus stop. I sighted the taxi first. When I first saw the taxi it was at the bus stop. It was moving. Then came the scooter and at the bend the taxi cut into the path of the scooter. There was a bend before reaching the hospital. The bend was nearer to the Secretariat than the bus stop. It was a bend on the main road."

According to P.W.4 both vehicles had small lights on. The scooter was doing about 20 m.p.h. The taxi

A was doing about 30 m.p.h. After the deceased and P.W.3 were taken to the hospital he saw the two passengers of the taxi going away.

In my opinion, the learned stipendiary magistrate was wrong in finding that there was no evidence as to where P.W.4 was standing. If he had studied the cross-examination carefully he would have realised where P.W.4 was standing at the time of the accident.

Although the respondent submitted that there were discrepancies in P.W.4's evidence he conceded that if P.W.4's evidence was accepted there was evidence of negligence. He further submitted that the respondent's explanation was consistent with his innocence in so far as the charge under section 304A was concerned. C There is no doubt that if the learned stipendiary magistrate had not overlooked the evidence arising out of P.W.4's cross-examination he would have convicted respondent on the first count. He made this clear in his judgment I mentioned earlier. He was apparently satisfied that the collision occurred on the scooter's side of the road because of the presence of broken D glasses on the road as shown by the sketch plan. At page 23 of the record he remarked that:

"If anything, this sketch plan at least suggests that the collision in fact occurred on the scooter's side of the road."

The nature and degree of negligence required to support a conviction under section 304A has been laid down in *Public Prosecutor v. P.G. Mills*<sup>(1)</sup> which was decided in 1955 by the Court of Appeal of Sarawak, North Borneo and Brunei on a reference from the High Court, Brunei under section 13 of the Courts Ordinance. At that time there was what was known as the combined judiciary with jurisdiction over the territories of Sarawak, North Borneo (Sabah) and Brunei. The Sarawak, North Borneo and Brunei (Courts) Order in Council 1951 established one superior court of record styled as the Supreme Court of Sarawak, North Borneo and Brunei consisting of the High Court of Sarawak, North Borneo and Brunei and the Court of Appeal of Sarawak, North Borneo and Brunei. After Malaysia the superior court, ceased to exercise jurisdiction over Brunei. Subsections (3) and (4) of section 88 of the Malaysia Act read as follows:—

G "(3) Anything done before Malaysia Day in or in connection with or with a view to any proceedings in the Court of Appeal of the Federation, or of Sarawak, North Borneo and Brunei, or of Singapore, or the Court of Criminal Appeal in Singapore, shall on and after that day be of the like effect as if that court were one and the same court with the Federal Court.

H (4) Anything done before Malaysia Day in or in connection with or with a view to any proceedings in the High Court of the Federation, or of Sarawak, North Borneo and Brunei, or of Singapore shall on and after that day be of the like effect as if those High Courts were respectively one and the same court with the High Court in Malaya, the High Court in Borneo and the High Court in Singapore."

The jurisdiction and function of the High Court of Sarawak, North Borneo and Brunei were succeeded by the High Court in Borneo. In the same way the appellate jurisdiction of the Court of Appeal of Sarawak, North Borneo and Brunei was absorbed by the Federal Court.

In *Mills*' case<sup>(1)</sup> the Court of Appeal declined to follow *Cheow Keok v. Public Prosecutor*<sup>(2)</sup> which over-

ruled *Lai Tin v. Public Prosecutor*<sup>(3)</sup> and laid down that a high degree of negligence must be proved before a person could properly be convicted of an offence under section 304A as would be required to be proved to sustain a conviction for manslaughter by negligence in England and that English authorities should be followed. Instead the Court of Appeal decided to follow the full bench of the High Court of Singapore in *Woo Sing & Anor. v. R.*<sup>(4)</sup> which also did not follow *Cheow Keok's case*<sup>(2)</sup>. The Court of Appeal observed that section 304A did not require a degree of negligence comparable to that required to support a conviction for manslaughter in England and that it was unnecessary to lay down a standard of negligence in civil and criminal cases although a higher standard of proof was required in the latter cases. The reasons for the course taken in *Mills' case*<sup>(1)</sup> were stated by Williams C.J. as follows:—

"Notwithstanding the opinion of *Ratanlal* in 'Law of Crimes' and the decision of *Cheow Keok v. Public Prosecutor* [1940] M.L.J. 103 which was not followed in *Woo Sing & Anor. v. R.* [1954] M.L.J. 200 I am of the opinion that the standard of negligence required for a conviction under section 304A(1) cannot be equated with that required for a conviction for manslaughter and that although the two crimes may and indeed do overlap they are essentially different. The main feature of the offence under section 304A(1) is the causing of death by doing an act which was rash or negligent but which was neither designed nor voluntary. The opinion expressed by the Full Court of Singapore in *Woo Sing & Anor. v. R. supra*, is, I consider, sound: it is to the effect that the Penal Code is not a codification of English Law and it is dangerous, particularly in homicide cases, to try and introduce English case law into the consideration of the Code. English cases stress the grossness of the negligence necessary to constitute manslaughter but I am not prepared to hold that the acts of rashness or negligence which cause death must be of that very high degree before an offence under section 304A(1) can be committed."

Only recently these two conflicting decisions were discussed by the full bench of the High Court of Singapore in *Mah Kah Yew v. Public Prosecutor*<sup>(5)</sup> where it was held that by virtue of the provisions of section 88(3) of the Malaysia Act and section 13 of the Republic of Singapore Independence Act, 1966 it was bound by the decision of the Court of Appeal of Sarawak, North Borneo and Brunei in *Public Prosecutor v. Mills*<sup>(1)</sup> which was of the like effect as if the court was the Federal Court. In reaching this decision the court relied on the case of *Re Lee Gee Chong, decd.*<sup>(6)</sup> where the Federal Court held that by virtue of section 88(3) of the Malaysia Act the Federal Court must be regarded as being one and the same court as the Court of Appeal of Singapore. Wee Chong Jin C.J. delivering the judgment of the full bench observed that *Cheow Keok v. Public Prosecutor*<sup>(2)</sup> was not a decision of the Court of Appeal of the Federation of Malaya but was a decision of the Court of Appeal of the Federated Malay States and as such it was not a decision of a court which was binding but was only a highly persuasive authority.

This is true as section 88(3) does not expressly mention the Court of Appeal of the Federated Malay States. On the other hand in *China Insurance v. Loong Moh Co. Ltd.*<sup>(7)</sup> the Federal Court sitting in Singapore held itself bound by the case of *K. E. Mohamed Sultan Maricar v. Prudential Assurance Co. Ltd.*<sup>(8)</sup> a decision of the Straits Settlements Court of Appeal which is

A also not expressly referred to in section 88(3). Although Thomson L.P. expressed doubts as to the correctness of the decision he did not, however, indicate the grounds upon which he based his doubts.

B It becomes necessary to see if the decision of the Court of Appeal of the Federated Malay States is binding on the courts in Malaysia. Section 3 of the Federated Malay States Courts Enactment (Laws of the Federated Malay States, Vol. 1 Cap. 2) states that—

"The Courts for the administration of civil and criminal law in the Federated Malay States shall be as follows:—

(a) the Supreme Court comprising the Court of Appeal and the Court of a Judge.

C (b) ...."

Following the formation of the Malayan Union in 1946, the Malayan Union Courts Ordinance (No. 3 of 1946) was promulgated. Section 3 provides that:—

"There shall be the following courts for the administration of civil and criminal law in the Malayan Union—

D (a) the Supreme Court comprising the High Court and the Court of Appeal.

(b) ...."

Section 11 provides that:—

"Subject to the provisions of this Ordinance the High Court shall be deemed to have taken the place of the courts set out in the Second Schedule to this Ordinance."

E One of the courts set out in the Second Schedule is the court of a judge in the Federated Malay States. Also section 14 provides that:—

"Subject to the provisions of this Ordinance the Court of Appeal shall be deemed to have taken the place of the courts set out in the Third Schedule of this Ordinance."

The Court of Appeal of the Federated Malay States is one of the courts set out in the Third Schedule.

F In the process the High Court and the Court of Appeal have assumed the jurisdiction of the court of a judge and the Court of Appeal of the Federated Malay States respectively. In consequence it may be said that the Malayan Union Court of Appeal would be bound by applicable decisions of the Court of Appeal of the Federated Malay States.

G In 1948 a new Courts Ordinance (No. 43 of 1948) was passed as a result of the formation of the Federation of Malaya. Section 110 of the Ordinance provides that:—

"The Ordinances and Enactments set out in the Fifth Schedule hereto are hereby repealed to the extent specified in the third column of such Schedule."

H One such Ordinance referred to in the Fifth Schedule is the Malayan Union Courts Ordinance which was repealed *in toto*. However no provision similar to section 14 of the Malayan Union Courts Ordinance was made. With the result it was left to the Court of Appeal to decide whether it was bound by applicable decisions of the previous Courts of Appeal.

I With the formation of Malaysia in 1963 three High Courts of co-ordinate jurisdiction and status, namely, High Court in Malaya, High Court in Borneo and High Court in Singapore came into existence. Above these courts is the Federal Court which assumes the jurisdiction of the Courts of Appeal of the Federation of Malaya, of Sarawak, North Borneo and Brunei,

and of Singapore: see section 88(3) of the Malaysia Act. There is no doubt that the Federal Court would be bound by applicable decisions of the Courts of Appeal specified in section 88(3). In *Hendry v. De Cruz*<sup>(9)</sup> the Federation of Malaya Court of Appeal considered itself bound by an applicable decision of the Malayan Union Court of Appeal in *Butler Madden v. Krishnasamy*.<sup>(10)</sup> Since the jurisdiction of the Court of Appeal of the Federated Malay States was assumed by the Malayan Union Court of Appeal the better view would seem to be that the Federation of Malaya Court of Appeal would on the doctrine of *stare decisis* be bound by the decision of the Court of Appeal of the Federated Malay States.

There are thus two conflicting decisions of the appellate courts. I am of the opinion that *Mills'* case<sup>(11)</sup> correctly interpreted the standard of negligence required for a conviction under section 304A. If it were not for the event of Malaysia or if section 88(3) of the Malaysia Act were given a strict interpretation *Mills'* case<sup>(11)</sup> would be the only decision binding all the subordinate courts in East Malaysia. *Mills'* case<sup>(11)</sup> accepted the opinion expressed in *Woo Sing's* case<sup>(4)</sup> as sound. It is interesting to note that although Buhagiar J. found himself bound by *Cheow Keok's* case<sup>(2)</sup> he indicated clearly in *Anthony'samy v. Public Prosecutor*<sup>(11)</sup> that *Woo Sing's* case<sup>(4)</sup> gave the correct interpretation of section 304A. The court in *Mah Kah Yew v. Public Prosecutor*<sup>(5)</sup> concurred with the reasons set out by Buhagiar J. for agreeing with the decision in *Woo Sing's* case.<sup>(4)</sup>

A Privy Council case which neither counsel has cited but which I would refer to is *Dabholkar v. The King*.<sup>(12)</sup> In that case a doctor was convicted of giving surgical treatment negligently and in a manner likely to endanger life or to cause harm contrary to section 222 of the Tanganyika Penal Code. The Court of Appeal for Eastern Africa quashed the doctor's conviction on a charge of being accessory after the fact to an attempt to procure an abortion but confirmed his conviction on the charge of negligence under section 222 holding that "it is not necessary for a conviction under section 222(e) of the Penal Code that the negligence should be of that high degree which is necessary for a conviction for manslaughter. Something of a lesser degree is all that is necessary." The relevant provisions of section 222 read:—

"222. Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person—

(a) drives any vehicle or rides on any public way; or....

(e) gives medical or surgical treatment to any person whom he has undertaken to treat;....  
is guilty of a misdemeanour."

In delivering a short judgment of the Privy Council Lord Oaksey stated:—

"Their Lordships are of the opinion that the Court of Appeal were right in the interpretation which they put on section 222. The negligence charged in that section is not necessarily as grave, either in its nature or its consequences, as in the offence of manslaughter. The analogy between this section and section 11 of the English Road Traffic Act, 1930, is, in their Lordships' view, a true analogy, and just as in *Andrews v. Director of Public Prosecutions* [1937] A.C. 576 the House of Lords explained the different degrees of negligence which the prosecution must prove to establish the offences of mans-

A laughter and dangerous driving, so in the case of section 222 the degree of negligence differs in cases of the felony of manslaughter and in cases of misdemeanour under section 222. The circumstances dealt with in the subsections of section 222 are all circumstances which in themselves involve danger and, although the negligence which constitutes the offence in these circumstances must be of a higher degree than negligence which gives rise to a claim for compensation in a civil court, it is not, in their Lordships' opinion, of so high a degree as that which is necessary to constitute the offence of manslaughter."

B These observations tend to support the interpretation of section 304A in *Mills'* case.<sup>(11)</sup> The negligence must be higher than the negligence which gives rise to a claim for compensation in a civil court. But the negligence is not of so high a degree as that which is necessary to constitute manslaughter. Perhaps it can be said that the degree of negligence stands between the degree of negligence necessary to support a civil action for compensation and a high degree of negligence required in a manslaughter charge in England. It would be dangerous to convict a person of negligence based on the degree of negligence applicable to a civil action as this would be converting a tort into a crime. Such a course would also imperil the liberty of the subject and operates to the disadvantage of the accused.

C Both section 222 and section 304A refer to "rashness or negligence." In the latter, death is the consequence of the rash or negligent act. Whereas the consequence resulting from the rash or negligent act in the former is the endangering of human life or causing harm as in sections 280, 284, 285, 286, 287, 336, 337 and 338 of the Sabah Penal Code. In both cases the consequences are the results of rashness or negligence. Our Penal Code makes no distinction between felony and misdemeanour. The different degrees of penalty are provided according to the gravity of the offences as reflected by the consequences of the rashness or negligence. The question of penalty should not affect the interpretation of the same words in the Code. The meaning of "rashness or negligence" given to one section should therefore be the same for other sections in the Penal Code.

D The next two grounds may be taken together. E The appellant contended that since the learned stipendiary magistrate had found that "the evidence disclosed a degree of negligence which is more than sufficient to warrant a conviction under section 14(1) of the Road Traffic Ordinance (Cap. 128)" it must follow that when death was proved to have been caused by that negligence there should be a conviction under section 304A as well. Buhagiar J. also considered that there was no difference in the degree of negligence for a conviction under section 304A and negligent and inconsiderate driving. Subject to the reservation that charges under section 304A of the Penal Code and section 14(1) of the Road Traffic Ordinance, being criminal in nature, the standard of proof must be higher than in civil case, I respectfully agree with the reasons given by Buhagiar J. In *Tan Kim Chang v. R.*,<sup>(13)</sup> Whitton J. also considered that a finding of negligence under section 14(1) of the Road Traffic Ordinance must be sufficient finding of negligence under section 304A. This view was also shared by Silke J. in *John Liao v. Public Prosecutor*<sup>(14)</sup> when he stated that "It is my view that evidence sufficient to sustain a charge

under section 14 of the Road Traffic Ordinance is sufficient to sustain negligence under section 304A." The only difference is that in the case of section 304A it will be necessary for the prosecution to establish the further element that the rash or negligent act was the immediate cause of death and not the remote cause.

A few years after *Mills' case*,<sup>(1)</sup> *R. v. Lucas bin Daim*<sup>(15)</sup> came before Williams C.J. In that case the accused was convicted for causing the death of a person near the railway station at Papar by negligent driving of a landrover, contrary to section 304A. In the course of his judgment Williams C.J. stated that "I do not have to distinguish between the degree of negligence in a civil and a criminal action. I must, however, feel sure before I convict that he was negligent in this manner of driving." After analysing the evidence he continued "I therefore hold that there was some negligence on his part and that death was caused by the act of negligence. In considering the charge the fact that the deceased contributed to his death by his own negligence is immaterial." He imposed a fine on the accused since he considered the accused's negligence of a low order. In dismissing the appeal in the case of *Ellen Joyce Kay v. R.*<sup>(16)</sup> Simpson J. referred to *R. v. Lucas bin Daim*<sup>(15)</sup> and said "It is sufficient in a charge under section 304A to prove some negligence on the part of the accused and that death was caused by that act of negligence." On the question of standard of proof, Murray-Aynsley C.J. in *Woo Sing's case*<sup>(4)</sup> remarked that "I do not think it is necessary to lay down a different standard of negligence in civil and criminal cases, although of course a higher standard of proof is required in the latter case."

The learned stipendiary magistrate considered that the test in *Cheow Keok's case*<sup>(2)</sup> was too high. Yet he chose to rely on *Kuan Choon Hin v. Public Prosecutor*<sup>(17)</sup> and stated that "this court believes that the degree of negligence must be substantially high to warrant such a conviction." Poyser C.J. was a member of the Court of Appeal of the Federated Malay States in *Cheow Keok's case*<sup>(2)</sup> and he delivered the judgment in *Kuan Choon Hin's case*<sup>(17)</sup> in which reference was made to *Cheow Keok's case*.<sup>(2)</sup> The learned stipendiary magistrate had no choice but to follow the test laid down in *Mills' case*,<sup>(1)</sup> a decision of a superior court in Borneo. He appeared to be confused by the statement of Williams C.J. that the standard of proof of an offence under section 304A is the same as that required in any criminal offence in England. The fundamental principle of our criminal law is in no way different from England in that it is for the prosecution to prove the guilt of an accused person beyond reasonable doubt.

In this case the respondent was driving in a zig zag fashion. The respondent's act, if not rash, was certainly negligent and to such a degree as to endanger human life and the safety of other road users. It was rash or negligent driving which caused the deceased and his passenger to be thrown off the scooter resulting in the death of the deceased due to serious multiple injuries he received. The respondent's rash or negligent act was the immediate cause of death and not merely a remote cause of it. Once the learned stipendiary magistrate accepted that the respondent was driving

A in a zig zag fashion he had no alternative but to convict the respondent on the first count. This would certainly have been so if he had not made a wrong finding of fact and misunderstood *Mills' case*.<sup>(1)</sup>

Although *Mills' case*<sup>(1)</sup> does not consider a very high degree of negligence is required to support a conviction under section 304A, the Court of Appeal has not laid down the precise standard in measuring rashness or negligence. This is what Williams C.J. said in *Mills' case*:<sup>(1)</sup>

C "In my view and in answer to the Public Prosecutor's certificate the nature and degree of negligence in an act causing death required to support a conviction under section 304A(1) is the same as that in any other act carried out so rashly or negligently as to endanger human life or the safety of others where that act was the immediate cause of death and not the remote cause. It is not possible to assess degrees of negligence and rashness with any precision as we have no precise standard whereby we can measure either negligence or rashness."

D The degree of lack of care and attention required to support a conviction under section 14(1) of the Road Traffic Ordinance has been laid down in *Voo Yun Fatt v. R.*<sup>(18)</sup> In answer to a reference from the High Court, Jesselton (as it was then known) the Court of Appeal of Sarawak, North Borneo and Brunei stated:—

E "that the degree of lack of care and attention required to support the conviction of a driver of a motor vehicle under section 14(1) of the Road Traffic Ordinance is the lack of that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances."

Reference was made to *Simpson v. Peat*<sup>(19)</sup> and *Bourhill v. Young*.<sup>(20)</sup> Boldley J. delivering the judgment of the court, observed that:—

F "In the latter case which was a civil one, the House of Lords held that the duty of a motor cyclist on a public road to other persons using it was to drive with such reasonable care as would avoid the risk of injury to such persons as he could reasonably foresee might be injured by his failure to exercise that care."

G In the latter case of *Simpson v. Peat*, a criminal case before the Queen's Bench Division which was followed by Rogers J. the case of *Hay or Bourhill v. Young* was not even mentioned and the five judges of that court unanimously held that if a driver was not exercising that degree of care and attention which a reasonably prudent driver would have exercised in the circumstances he was guilty of the offence charged.

In our opinion different considerations apply in a criminal case than in a civil one and this court therefore considers it should follow the judgment in *Simpson v. Peat*.<sup>(19)</sup>

H This decision is the decision of the same court which heard *Mills' case*.<sup>(1)</sup> By the same approach and for the same reason *Voo Yun Fatt v. R.*<sup>(18)</sup> must be regarded as the decision of the Federal Court. Consequently it is binding on the lower courts. The test that "a reasonable and prudent driver would exercise in the circumstances" of a particular case in *Simpson v. Peat*<sup>(17)</sup> as accepted by the Court of Appeal could be applied to section 304A cases bearing in mind the additional element required to be established. But the proof must be such as to satisfy the court "beyond reasonable doubt". It will not only create a great deal of confusion but also difficulty if "negligence" in the various sections of the Penal Code and Road Traffic legislation is given different meanings requiring different degrees of proof ascending like steps of a ladder according to the gravity of the offences.

For the reasons given I would allow the appeal. The order of acquittal is set aside. Pursuant to section 266(c) of the Criminal Procedure Code I find the respondent guilty of the first count and convict him accordingly. Although contributory negligence is no defence in a criminal charge, nevertheless it is a mitigating factor which should be taken into consideration in assessing sentence. In this case the deceased was not at fault at all. He was knocked down while proceeding on his side of the road. The negligent act of the respondent which caused the death of the deceased showed callousness on the respondent's part as regards risk to which others using the road were exposed. The severity of sentence should depend on the degree of callousness which was shown by the respondent. I sentence the respondent to four months' imprisonment. Further, in the exercise of my revisionary powers I would set aside the order of disqualification and substitute an order of disqualification from holding a driving licence for a period of one year.

*Appeal allowed.*

**ONG TIAW KOK & ANOR. v.  
BIAN CHIANG BANK LTD.**

[O.C.J. (B.T.H. Lee J.) November 12, 1971]

[Kuching — Civil Suit No. K. 34 of 1968]

*Banking — Contract — Loan by a bank — Charge on land — Whether borrower had assented or acquiesced to charging of compound interest — Whether there was agreement for partial releases of land — Estoppel by conduct — Accounts.*

The plaintiffs had been granted a loan in order to start a housing enterprise. They executed a charge for the sum of \$110,000 in favour of the defendant bank at a monthly interest of 9.6% *per annum*, giving by way of security a charge on certain lands belonging to them. Subsequently they executed another charge upon security of the land for the sum of \$440,000 at the interest set out in the charge. They claimed a declaration that they were entitled to have released from the said charges by the defendant the lots of land under the said charges upon payment of \$8,000 for each lot, a further declaration that the rate of interest chargeable by the defendant should be 9.6% *per annum* and calculated at monthly rests and an account of the interest overcharged by the defendant.

The defendant bank alleged that the plaintiffs had agreed to pay or acquiesced in the payment of compound interest. The defendant also denied any agreement for partial releases of the land, and contended that even if there was such an agreement, it was unenforceable for lack of consideration.

**Held:** (1) the plaintiffs had never agreed to or acquiesced in the payment of compound interest and therefore the defendant bank was not entitled to charge such compound interest;

(2) although there was no consideration for the agreement for partial releases of the land, the promise of the defendant to give such partial releases had in fact been acted upon by the plaintiffs and therefore was binding on the defendant;

(3) in the circumstances there must be an inquiry to determine the amount of interest overcharged by the defendant bank.

**A Cases referred to:-**

- (1) *Majumder v. Attorney-General of Sarawak* [1969] 1 M.L.J. 132 at p. 134.
- (2) *Moore & Ors. Assignees of Sheath & Ors. v. Voughton* (1816) 1 Start 487; 171 E.R. 538.
- (3) *Dawes v. Pinner* (1801) 2 Camp. 480.
- (4) *Re Williams* (1869) I.R. 3 Eq. 346.

**B**

- (5) *Eaton v. Bell* (1821) 5 B. & Ald. 34; 106 E.R. 1166.
- (6) *Williamson v. Williamson* (1869) L.R. 7 Eq. 542; 20 L.T. 389.

- (7) *Spencer v. Wakefield* (1887) 4 T.L.R. 194.

- (8) *Ferguson v. Fyffe* (1841) 8 Cl. & Fin. 121, 140; 8 E.R. 49.

- (9) *Overseas Chinese Banking Corporation v. Tan Cheng Hoe* [1967] 1 M.L.J. 98.

- (10) *Mahomed Salleh v. Nacodah Merican* (1889), 4 Ky. 463.

- (11) *Brooks & Co. v. Blackburn Benefit Society* (1884) 9 App. Cas. 857, H.L.

- (12) *Parkinson v. Wakefield & Co.* (1889) 5 T.L.R. 646, C.A.

- (13) *Currie v. Misa* (1875) L.R. 10 Ex. 153 at p. 162.

- (14) *Stilk v. Myrick* (1809) 170 E.R. 1168.

- (15) *Vanbergen v. St. Edmund's Properties Ltd.* [1933] All E.R. 488.

- (16) *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] 1 K.B. 130.

- (17) *Combe v. Combe* [1951] 1 All E.R. 767 at p. 770.

- (18) *Robertson v. Minister of Pensions* [1949] 1 K.B. 227.

- (19) *Kepitigalla Rubber Estate Ltd. v. National Bank of India, Ltd.* [1909] 2 K.B. 1011 at p. 1028.

- (20) *Murugesam Pillai v. Gnana Sambandha* A.I.R. 1917 P.C. 6 at p. 8.

- (21) *Rameshwar Singh v. Bajit Lal Pathak & Ors.* A.I.R. 1929 P.C. 95 at p. 99.

**CIVIL SUIT.**

**F** *Patrick Tan* for the plaintiffs.

*T. O. Thomas* for the defendant.

**B.T.H. Lee J.:** To appreciate the points canvassed before the court a few facts need be mentioned before I come to the pleadings which are somewhat elaborate.

**G** Sometime about May, 1957, Ong Tiaw Kok, the first plaintiff and his brother, Ong Tiaw Sian, the second plaintiff in this suit applied to the defendant, Bian Chiang Bank Ltd., Kuching, (hereinafter called "the bank") for a loan in order to start a housing enterprise, comprising six shophouses and 97 terrace houses.

**H** The plaintiffs executed a charge for the sum of \$110,000 in favour of the defendant bank at a monthly interest of 9.6% *per annum*, giving by way of security certain lands belonging to plaintiffs.

Upon the charge, the plaintiffs were allowed to overdraw.

**I** The plaintiffs continued the account in this way until August, 1967, when they executed another charge upon security of land for the sum of \$440,000 at an interest set out in that charge.

The second plaintiff, Ong Tiaw Sian, was at all material times a sleeping partner and has given his brother, the first plaintiff full power and authority to manage their joint business.